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Kon Kee Chien v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–387 OF 2010
JEFFREY TAN, BALIA YUSOF AND MOHTARUDIN BAKI JJCA
13 SEPTEMBER 2011

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction — Dangerous drugs found in bag in appellant's hotel room — Whether defence relied on fictional figure — Whether appellant had exclusive possession of hotel room and possession of prescribed drugs — Whether there was serious miscarriage of justice by trial judge — Dangerous Drugs Act 1952 ss 37(d), 37(da) & 39B(1)

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Criminal Procedure — Trial — Misdirection — Whether double presumptions wrongly invoked against appellant — Whether there was serious miscarriage of justice by trial judge — Dangerous Drugs Act 1952 ss 37(d), 37(da) & 39B(1)

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Acting on information received, a police party headed by a Lance Corporal ('SP2') had conducted an observation of a certain location in Johor Bahru. During that surveillance the police party had spotted the appellant. When SP2 approached the appellant and identified himself as a police officer, the appellant tried to run but was apprehended. The appellant was subjected to a

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body search. In this search the police found three packets of 11.24g of methamphetamine in the appellant's trouser pocket and also a key to room 311 of the Hotel Spa in Johor Bahru (room 311). The police then searched room 311 and recovered a black bag which was found to contain drugs that upon analysis were found to be 62.05g of methylenedioxymethamphetamine, 7.3g

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of methamphetamine and 10.37g of ketamine, which were all dangerous drugs. The appellant was charged with trafficking in 62.05g of methylenedioxymethamphetamine and three lesser offences for possession of dangerous drugs under the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution case, the trial judge held that possession of the drugs could

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only be made out by invocation of s 37(d) of the Act and that there had been no direct evidence of any trafficking activity. As such, the trial judge held that the trafficking charge had not been made out and the trafficking charge was amended to an offence punishable under s 39A(2) of the Act. The appellant pleaded guilty to the amended charge and to the drug possession offences. The

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prosecution appealed to the Court of Appeal against that amendment of the trafficking charge. The Court of Appeal ordered the appellant to enter his defence to the original trafficking charge but imparted no reasons for that decision. When trial recommenced in the High Court on the original trafficking charge, the appellant testified that he was not the only person to

room 311, which had been occupied by him and his girlfriend and that the black bag from which the drugs were recovered belonged to his girlfriend, who had fled the scene when he was apprehended by the police. The trial judge found that the appellant's version of events that included his girlfriend was an invention; that only the appellant had access to room 311; and that the appellant had knowledge of the drugs in the black bag. The trial judge thus invoked the presumption of trafficking under s 37(da) of the Act and held that the appellant had not cast any reasonable doubt nor rebutted the presumption of trafficking. The High Court thus convicted the appellant for trafficking in a dangerous drug. This was the appellant's appeal against that conviction. In this appeal the appellant contended that there had been a serious miscarriage of justice by the invocation of a presumption upon a presumption by the trial judge. The appellant submitted that the trial judge after invoking the presumption under s 37(d) at the close of the prosecution case had then invoked the presumption under s 37(da) at the end of the entire case. The appellant also submitted that as the prosecution had not proved the appellant's exclusive possession of room 311, it could not be inferred that he had custody or control of the drugs in room 311.

Held, dismissing the appeal:

(1) The evidence of the prosecution was that the appellant was alone when he checked into room 311 and when he was arrested and there was no evidence to suggest that the appellant was with a female at any one time. In fact the existence of the girlfriend only surfaced for the first time when the appellant was in the witness stand. Thus, the appellant's failure to disclose the existence of the girlfriend to the police entitled the trial judge to find that the girlfriend was a fiction and that the defence was an afterthought. Further, the contemporaneous conduct of the appellant also evinced that he had all the requisite knowledge of the contents in the black bag (see paras 13 & 16).

(2) The unchallenged evidence of the hotel manager of the Hotel SPA that room 311 was unoccupied for three days before the appellant had use of that room and that there was only one duplicate key to room 311, which he held and had not used to enter the room in question proved that the appellant had exclusive possession of room 311. As such, no other person could have entered room 311 after the appellant had use of it or have left the black bag and its contents in the room (see paras 14–16).

(3) Although the trial judge had invoked s 37(d) at the close of the prosecution case, that invocation would have been reversed by the Court of Appeal (a different panel) when the appeal by the prosecution against the trial judge's amendment of the trafficking charge was allowed. Thus, when the trial judge recommenced on the original trafficking charge, he understood that the invocation of s 37(d) of the Act had been reversed by

A the Court of Appeal and that the appellant's possession of the dangerous drugs had been made out without the invocation of s 37(d) of the Act. Thus, only s 37(da) of the Act was invoked by the trial judge at the close of the entire case and there had been no miscarriage of justice (see para 20).

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[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diterima, sekumpulan polis diketuai oleh Lans Koperal ('SP2') telah menjalankan satu pemerhatian di lokasi tertentu di Johor Bahru. Semasa pengawasan, anggota polis tersebut telah
C mengesan perayu. Apabila SP2 mendekati perayu dan mengenalkan dirinya sebagai pegawai polis, perayu cuba untuk melarikan diri tetapi dia diberkas. Carian badan dilakukan ke atas perayu. Dalam carian ini, polis menemui tiga peket 11.24g methamphetamine dalam poket seluar perayu dan juga kunci untuk bilik 311 Hotel Spa di Johor Bahru ('bilik 311'). Polis kemudiannya
D menggeledah bilik 311 dan menemui satu beg hitam yang didapati mengandungi dadah-dadah dan selepas dianalisa, didapati 62.05g methylenedioxymethamphetamine, 7.3g methamphetamine dan 10.37g ketamine, yang kesemuanya merupakan dadah berbahaya. Perayu dipertuduh mengedar 62.05g methylenedioxymethamphetamine dan tiga lagi kesalahan
E kecil bagi milikan dadah berbahaya di bawah Akta Dadah berbahaya 1952 ('Akta'). Pada penutup kes pendakwaan, hakim perbicaraan memutuskan bahawa milikan dadah hanya boleh dibuat dengan menggunakan s 37(d) Akta dan bahawa tiada keterangan secara langsung mengenai sebarang aktiviti pengedaran. Oleh itu, hakim perbicaraan memutuskan bahawa tuduhan
F pengedaran tidak dibuktikan dan tuduhan pengedaran dipinda kepada kesalahan yang boleh dihukum di bawah s 39A(2) Akta. Perayu memplid bersalah kepada tuduhan pindaan dan kesalahan memiliki dadah. Pendakwa raya merayu ke Mahkamah Rayuan terhadap pindaan tuduhan pengedaran. Mahkamah Rayuan mengarahkan perayu untuk memasukkan pembelaannya
G kepada tuduhan pengedaran asal tetapi tidak menyatakan sebarang alasan untuk keputusan tersebut. Apabila perbicaraan semula dijalankan di Mahkamah Tinggi atas tuduhan pengedaran asal, perayu memberi kenyataan bahawa dia bukannya satu-satunya orang yang menduduki bilik 311, bilik tersebut diduduki olehnya dan teman wanitanya dan bahawa beg hitam dari
H mana dadah tersebut didapati adalah kepunyaan teman wanitanya yang melarikan diri daripada tempat kejadian apabila dia diberkas oleh polis. Hakim perbicaraan mendapati bahawa versi kejadian perayu yang memasukkan teman wanitanya hanya satu rekaan; bahawa hanya perayu mempunyai akses kepada bilik 311; dan bahawa perayu mempunyai pengetahuan mengenai
I dadah-dadah dalam beg hitam. Oleh itu, hakim perbicaraan menggunakan anggapan pengedaran di bawah s 37(da) Akta dan memutuskan bahawa perayu tidak menimbulkan sebarang keraguan munasabah atau menyangkal anggapan pengedaran. Dengan ini, Mahkamah Tinggi menyabitkan perayu mengedar dadah berbahaya. Ini merupakan rayuan perayu terhadap sabitan tersebut.

Dalam rayuan ini, perayu menghujah bahawa terdapat salah laksana keadilan yang serius dengan menggunakan anggapan atas satu anggapan oleh hakim perbicaraan. Perayu menghujah bahawa selepas hakim perbicaraan menggunakan anggapan di bawah s 37(d) di penutup kes pendakwaan, beliau telah menggunakan anggapan di bawah s 37(da) pada penutup keseluruhan kes. Perayu juga menghujah bahawa memandangkan pihak pendakwaan tidak membuktikan milikan eksklusif perayu terhadap bilik 311, tidak boleh disimpulkan bahawa dia mempunyai jagaan atau kawalan ke atas dadah-dadah dalam 311.

Diputuskan, menolak rayuan:

(1) Keterangan pendakwaan adalah bahawa perayu bersendirian apabila dia mendaftar dalam bilik 311 dan apabila dia ditangkap, tiada keterangan menunjukkan bahawa perayu bersama seorang wanita pada satu-satu masa. Malah, kewujudan teman wanita hanya timbul buat kali pertama apabila perayu di bangku saksi. Oleh itu, kegagalan perayu untuk menyatakan kewujudan teman wanita kepada polis membenarkan hakim perbicaraan untuk membuat dapatan bahawa teman wanita tersebut merupakan satu fiksyen dan pembelaan tersebut merupakan pemikiran selepas. Seterusnya, tindakan susulan perayu juga menunjukkan bahawa dia mempunyai semua pengetahuan yang diperlukan mengenai kandungan dalam beg hitam (lihat perenggan 13 & 16).

(2) Keterangan tidak dicabar pengurus hotel di Hotel SPA bahawa bilik 311 tidak diduduki selama tiga hari sebelum perayu menggunakan bilik tersebut dan hanya terdapat satu kunci salinan kepada bilik 311, yang dipegang olehnya dan tidak digunakan untuk memasuki bilik tersebut, membuktikan bahawa perayu mempunyai milikan eksklusif bilik 311. Oleh itu, tiada sesiapa yang boleh memasuki bilik 311 selepas perayu menggunakannya atau telah meninggalkan beg hitam dan isi kandungannya dalam bilik (lihat perenggan 14–16).

(3) Walaupun hakim perbicaraan telah menggunakan s 37(d) pada penutup kes pendakwaan, penggunaan tersebut mungkin akan diakaskan oleh Mahkamah Rayuan (panel berbeza) apabila rayuan pendakwaan terhadap pindaan tuduhan pengedaran oleh hakim perbicaraan dibenarkan. Oleh itu, apabila hakim perbicaraan menjalankan perbicaraan semula tuduhan pengedaran asal, beliau faham bahawa penggunaan s 37(d) Akta telah diakaskan oleh Mahkamah Rayuan dan bahawa milikan dadah berbahaya perayu telah dibuktikan tanpa menggunakan s 37(d) Akta. Oleh itu, hanya s 37(da) Akta yang digunakan oleh hakim perbicaraan pada penutup keseluruhan kes dan tidak terdapat salah laksana keadilan (lihat perenggan 20).]

Notes

For cases on misdirection, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5253–5260.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Lee Gee Chong Deceased, Re; Tay Geok Yap & Ors v Tan Lian Cheow [1965] 1 MLJ 102, FC (refd)

Mustakim Chek Man v PP [2010] 2 MLJ 760; [2010] 6 CLJ 256, CA (refd)

PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 4 CLJ 2086, SC (refd)

Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Thien Teck Soon v PP [2011] 3 MLJ 438; [2011] 3 CLJ 632, 635, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37, 37(d), (da), 39A(2)

KL Chee (KL Chee & Co) for the accused.

Tengku Amir Zaki bin Tengku Abdul Rahman (Attorney General's Chambers) for the prosecution.

Jeffrey Tan JCA (delivering judgment of the court):

[1] This is an appeal by the accused against conviction for trafficking in a dangerous drug (62.05g of methylenedioxymethamphetamine) at 2.15pm on 13 February 2004 in room 311, SPA Hotel, Lien Hoe Complex, Taman Sentosa, in the District of Johor Bahru, in the State of Johor Darul Ta'zim.

[2] Conviction came about as follows. The appellant was tried for the aforesaid trafficking offence and three lesser offences for possession of dangerous drugs under the Dangerous Drugs Act 1952. The prosecution adduced the following evidence. At 12.30pm on 13 February 2004, Lance Corporal Sholeh bin Yaakub (SP2) received information on alleged drug activities being carried out by an ethnic Chinese in his forties at Jalan Sutera 1, Taman Sentosa, Johor Bahru. SP2 assembled a police party and proceeded to the stated place. There, at 1.30pm, SP2 saw an ethnic Chinese (the appellant). SP2 identified himself. The appellant tried to run but was apprehended. SP2 searched the appellant. From the trouser pocket of the appellant, SP2 uncovered a paper package that was later found to contain three packets of 11.24g of methamphetamine (the subject drugs of the fourth charge). The appellant had a key (P16) to room 311, Hotel SPA, Johor Bahru. SP2 conveyed the facts of the arrest to Chief Inspector Azhar bin Mohd Yusoff (SP6). At 2.15pm on 13 February 2004, SP6, SP2, police party and the appellant were at Hotel SPA, Johor Bahru. They proceeded to room 311. Room 311 was locked.

SP6 opened the door of room 311 with the key, P16. Room 311 was searched. Inside a closed but unlocked small cupboard (see p 36 of the appeal record *tambahan*) at the foot of the bed (see photograph P5F at p 53 of the appeal record), SP2 uncovered a black bag (P21). Inside that black bag was a weighing machine (P28), a Hotel Christine receipt No 6752 (P29) in the name of the appellant, and suspected drugs that upon analysis was found to be 62.05g of methylenedioxymethamphetamine (the subject drugs of the trafficking charge), 7.3g of methamphetamine (the subject drugs of the second charge), and 10.37g of ketamine (the subject drugs of the third charge).

[3] At the end of the prosecution case, the learned judge held that the trafficking charge had not been made out. The trafficking charge was amended to an offence punishable under s 39A(2) of the DDA 1952. Not unexpectedly, the appellant pleaded guilty to the amended charge and to the drug possession offences.

[4] Against that amendment of the trafficking charge, the prosecution appealed. And on 6 July 2010, the Court of Appeal (another panel) ordered the appellant to enter upon his defence to the original trafficking charge. No grounds or reasons were imparted by the Court of Appeal for that decision. But reasonably, the Court of Appeal must have held that the prosecution had adduced sufficient credible evidence to convict the appellant on the trafficking charge, that is, should the appellant elect to remain silent. The Court of Appeal must have held that there was a prima facie case for the appellant to answer. In coming to the decision as it did, the Court of Appeal must have also disagreed with the learned judge who held at the close of the prosecution case (i) that the appellant lacked the requisite knowledge of the drugs or nature of the drugs (see 90ART and 94ART) even though the appellant had physical possession of them (see 87ART), (ii) that possession of the drugs in question could only be made out by invocation of s 37(d) (see 100ART), and or (iii) that there was no direct evidence of a trafficking activity (see 100ART).

[5] When trial recommenced on the original trafficking charge as ordered by the Court of Appeal, the appellant, who was his only witness, rendered the following evidence in his examination-in-chief. On 13 February 2004, he was with his girlfriend, Tan Ah Ling (Ah Ling), at a coffee shop. Ah Ling walked off to buy newspapers. He proceeded to 'top up' the credit for his telephone. When he was arrested, he made no attempt to escape. The police recovered three packets of methamphetamine from him (see 15AR). The police brought him to the police station at Kampong Melayu, Johor Bahru, and then to Plentong, Johor Bahru. At Plentong, the police recovered the key to room 311 and the receipt (P29) from his shirt pocket (see 15AR–16AR). The police then brought him to Hotel SPA. The police waited for the arrival of 'Tuan Azhar' (see 16AR), but 'Tuan Azhar' did not come. The police opened room 311 with the key

recovered from him. The police ransacked room 311. The police showed him a black bag recovered from a cabinet/cupboard. Inside that bag were female clothing and drugs. That bag belonged to Ah Ling. When he checked into Hotel SPA, Ah Ling brought that bag. He did not ask Ah Ling about the contents of the bag. He had no knowledge of the drugs inside that bag. When he checked into Hotel SPA, he registered his name, 'tetapi saya masuk dua orang'. He could not remember whether a weighing machine was found in room 311. Before the arrival of 'Tuan Azhar', the police deposited the receipt into the bag. He lived with Ah Ling, who was unemployed, in a rented house at Taman Sri Tebrau. When he was arrested, he did not inform the police that the bag belonged to Ah Ling (see 17AR). He had no knowledge of the whereabouts of Ah Ling. The drugs belonged to Ah Ling. The police also searched his car and found a bag in the boot of his car. His clothing was inside that bag. The police searched but found nothing incriminating in his rented house at Taman Sri Tebrau.

[6] Under cross-examination, the appellant testified as follows. Only one policeman carried out the arrest on him, that is, about five minutes after Ah Ling had walked off to buy newspapers from the shop next door. Ah Ling telephoned him, but the police did not allow him to answer. Ah Ling fled from the scene when she saw that he was underarrest. Ah Ling had not contacted him since his arrest. Ah Ling was registered as a guest of Hotel SPA. Female clothing was inside the black bag. The search list had not been filled up when he signed it. The appellant disagreed that he was the only person with the key to room 311 and that he knew that there were drugs in that room. The appellant disagreed that he did not raise the matter of a bag in the boot of his car as the prosecution unfolded its case. The appellant also disagreed that he invented the story that the police had brought him to Kampong Melayu and to Plentong.

[7] The learned judge perceived that the outcome of the trial would turn on the latter defence. That was manifested in the following passage of the judgment of the learned judge:

> Tugas mahkamah pada peringkat ini ialah untuk memberi pertimbangan sama ada pembelaan OKT telah berjaya menimbulkan keraguan yang munasabah terhadap kes pihak pendakwaan dan juga atas imbangan kebarangkalian, sama ada OKT telah berjaya mematahkan anggapan di bawah s 37(da)(xxii) ADB 1952 … (see p 28, para 6, of the appeal record).

[8] Now, whether the Court of Appeal had invoked s 37(da) is not known. But s 37(da) was clearly invoked by the learned judge at the close of the defence. Given the rule against the invocation of a presumption upon a presumption, the finding of possession by the learned judge at the end of the entire case could not have been by any invocation of s 37(d). At the close of the defence, possession must have been found by the learned judge as a primary fact. That

was apparent at 28AR, where the learned judge held that the appellant had not cast any reasonable doubt nor rebutted the presumption of trafficking. At 29–33AR, the learned judge imparted his reasons for those crucial findings. Briefly stated, the learned judge held (i) that 'Ah Ling' was an invention, (ii) that there were no female clothing in the black bag, (iii) that the appellant had not given any prior notice of his story about him being brought by the police to Kampong Melayu and to Plentong or about the search of his car and the bag in the boot of his car or about the search of his rented house, (iv) that only the appellant had access to room 311, (v) that the appellant had knowledge of the drugs in the black bag, and, (vi) that the defence was a mere denial.

[9] Before us, learned counsel for the appellant, Mr KL Chee, orally submitted as follows. The appellant had no exclusive possession of room 311. Both P30 (guest registration form) and P31 (actual arrival report) stated that room 311 had '2 pax'. There was the possibility that a third party had access to room 311. It was the testimony of the appellant that the Hotel Christine receipt was found in his pocket. At the end of the prosecution case, the learned trial judge invoked s 37(d). But at the end of the entire case, the learned trial judge invoked s 37(da). There was a serious miscarriage of justice. In addition, in his written submission, learned counsel submitted as follows. The learned trial judge had not considered the testimony of the appellant and SP8 (the manager of Hotel SPA). The prosecution had not challenged the credibility of the appellant and SP8. It was the testimony of SP8 that he was on duty at the front registration desk for about only 6–15 minutes, and that the appellant replied, when he (SP8) asked him, that two persons would occupy room 311. Ah Ling was not a fiction. The existence of Ah Ling 'adalah munasabah'. The appellant should have been given the benefit of doubt. The prosecution had not proved the appellant's exclusive possession of room 311. It could not be inferred that the appellant had custody or control of the drugs in room 311. The drugs were not found with the appellant in room 311. Anyone could register as a guest with Hotel SPA. Anyone could have gained access to room 311. The owner and employees of the hotel had access to room 311. In the trial of a capital offence, evidence by inference alone is not sufficient for a conviction.

[10] The learned DPP was content to submit that the court needs only to consider whether the appellant had cast a reasonable doubt on the prima facie case. Indeed, that would seem to be so. '… the general principle applies that a court is bound by its own decision, until that decision is upset by a court whose decisions are binding on the first court' (*Re Lee Gee Chong Deceased; Tay Geok Yap & Ors v Tan Lian Cheow* [1965] 1 MLJ 102 per Wee Chong Jin CJ Singapore). That decision of the Court of Appeal dated 6 July 2010 has not been overturned, and so should not be questioned, certainly not by us. This

appeal must therefore proceed on the basis that there was a prima facie case on the trafficking charge. The outcome of this appeal must necessarily turn on the defence.

[11] Basically, the defence of the appellant was that the drugs in room 311 belonged to Ah Ling and that he had nothing to do with it. P30–P31, which stated that room 11 had '2 pax', were put forward to support the defence story that 'Ah Ling' was real and not a fiction and or to cast doubt to the prosecution story that the appellant had exclusive possession of room 311. We fully appreciate the importance attached by the appellant to P30–P31. But it was the unchallenged testimony of SP8 that the appellant was alone when he checked into the hotel, and that P30–P31 stated '2 pax' because the appellant had informed SP8 that there would be two occupiers — 'OKT kata 2 orang … Oleh itu saya tulis 2 orang' (see 56–57ART). But quite apart from that, we also find that the total body of evidence would not support the possibility that room 311 had '2 pax' and or that 'Ah Ling' was with the appellant when he checked into Hotel SPA.

[12] To begin with, there was no evidence from any one prosecution witness that could suggest that the appellant was with a female at any one time. Rather, the evidence of the prosecution was that the appellant was alone when he checked into Hotel SPA and when he was arrested. Further, the contemporaneous conduct of the appellant evinced that the appellant must have been alone at all times, for when he was arrested and when he was in room 311, there was not a whimper from the appellant that there was another person, and for when the black bag and contents were uncovered, there was not any plea or protestation from the appellant that the black bag and contents belonged to someone else but not to him. If 'Ah Ling' had done it, then it would not seem logical that the appellant would not have disclosed that to the police. In relation to that conduct of the appellant, we entirely agree with the learned judge that while there was no duty on the part of the appellant to disclose 'Ah Ling' to the police at the time of the arrest or when the black bag and contents were uncovered (see *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733, which was cited by the learned judge), yet failure by the appellant to disclose 'Ah Ling' to the police entitled the learned judge to disbelieve the existence of 'Ah Ling'.

[13] Disbelief in the existence of 'Ah Ling' and her alleged role was also not engendered by the failure of the appellant to give notice of 'Ah Ling' to the prosecution during the prosecution case. Yes, it was put to SP2 that the appellant was with a female of Chinese descent when he checked into Hotel SPA, that that female left that black bag in room 311, and that the appellant was with a female of Chinese descent just before his arrest (see 17–19ART). But 'Ah Ling' only surfaced for the first time when the appellant was in the

witness stand, which begs the question as to how it could be that 'Ah Ling' who was so important to the appellant to extricate himself could have been forgotten by him hitherto. The testimony of the appellant was that 'Ah Ling', who was his live-in girlfriend and who had just checked into Hotel SPA with him, had just walked off to buy newspapers before his arrest. If that were so, then it ought to follow that given the most recent of contact between them that 'Ah Ling' could not have faded from the memory of the appellant at the point of his arrest and search of room 311. Now if it were true that 'Ah Ling' was the owner of the black bag and contents, it would even be more unlikely that the appellant could have forgotten 'Ah Ling'. Yet 'Ah Ling' was not put forward by the appellant as the prosecution unfolded its case.

[14] But 'Ah Ling' was not the only matter that was only raised for the first time by the appellant when he was in the witness stand. There was also no prior notice of the defence case that the police brought the appellant to Kampong Melayu and to Plentong, that the police recovered the key to room 311 and the Hotel Christine receipt from the appellant whilst at Plentong, that the police searched the appellant's rented house and the appellant's car, that the police entered and searched room 311 without the presence of SP6, that female clothing was found inside that black bag, that the black bag belonged to 'Ah Ling', and, that before the arrival of SP6, the police deposited the Hotel Christine receipt into the black bag.

[15] In *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086, the former Supreme Court per Edgar Joseph Jr SCJ, as he then was, said:

> Indeed, it behoves the defence to do so (to put its case at the earliest possible stage) for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticised for keeping his defence 'up his sleeve' so to speak, and it branded as a recent invention.

[16] Since the latter said story was undoubtedly sprung for the first time when the appellant made his defence from the stand, we could not disagree with the learned judge who held that 'Ah Ling' was a fiction and that the defence was an afterthought. But be that as it may, we find that the contemporaneous conduct of the appellant also evinced that he had all requisite knowledge of the contents in that black bag, for it would simply not stand to reason that the appellant could just stand idly by and allow himself to be falsely incriminated, if he had no knowledge or had nothing to do with the contents in the black bag. But the appellant must have had something to do with the back bag. It was unchallenged evidence that P29 (the receipt dated 13 February 2004 of Hotel Christine and issued in the name of the appellant) was found in the black bag. The effect of the evidence of SP8 was that he issued P29 to the appellant (see 57ART) (P29 and P30 disclosed that Hotel Christine

A and Hotel SPA were located in the same building and were jointly managed). In any event, there was no evidence from the appellant that P29 was not handed to him. There was no evidence from the appellant that he handed that receipt to 'Ah Ling' on 13 February 2004 (it could not be any earlier, as the receipt was dated 13 April 2004) and just before he checked into the hotel on
B 13 February 2004. We ask, how could that receipt be in that black bag, if it were true that the appellant had nothing to do with that black bag? The logical answer must be that the appellant had deposited that receipt in that black bag. Given that receipt in the black bag, already it would not seem that the appellant could distance himself from that black bag. Now given the further fact that the
C appellant was registered as guest of that room from where the black bag and contents were uncovered soon after the appellant had checked into that room, and that the appellant had the key to that room, it could only appear that the appellant must be inextricably linked to the black bag and contents.

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[17] On the facts, it could not be that the appellant could have been as innocent as he had professed. Rather, it would only appear that it was the appellant who had deposited that black bag and contents in room 311, for it would not appear that someone else could have done so. The unchallenged
E evidence of SP8 was that room 311 was unoccupied for three days before the appellant had use of that room, that the chambermaids would hand over all things left inadvertently behind by guests to him, and that 'sebelum OKT masuk bilik itu, tiada apa-apa diserahkan oleh pembersih atau dijumpai sendiri oleh saya dalam bilik itu' (see 58ART). The effect of that evidence was that
F room 311 was emptied of all articles that did not belong to Hotel SPA, that is, before the appellant had use of that room. The further unchallenged evidence of SP8 was that there was only one duplicate key to room 311, that he held the duplicate key, that he had not used the duplicate key to enter room 311 on 13 February 2004, that the chambermaids could not enter guest rooms
G without his permission, that guest rooms would only be tidied after guests had checked out or when guests had requested so, that is, by leaving their room keys on the reception counter (see 58ART), and that 'tanpa kebenaran pelanggan tiada lain boleh masuk biliknya'. The effect of that evidence was that apart from the appellant, no one could enter room 311 on 13 February 2004. The
H possibility that a third party had access to room 311 could be discounted. But the combined effect of all that evidence, which was more telling, was that that black bag and contents were not in room 311 before the appellant had use of it, that the appellant had exclusive possession of room 311, and that no other person entered room 311 after the appellant had use of it.

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[18] Two other details, the room key being with the appellant and room 311 being locked, further substantiated that the appellant could not have lost exclusive possession of room 311. As said, it was the unchallenged evidence of SP8 that guest rooms would only be tidied after guests had checked out or

when guests had requested so, that is, by leaving their room keys on the hotel counter. Since the room key was in the possession of the appellant when he was arrested, then it would follow that the chambermaids would not have entered room 311 when the appellant was out. And room 311 was locked when the police were at the door. Together, those two details divulged that room 311 was locked from the moment that the appellant was out to the moment that the police were at the door. As said, it could not appear that anyone else could have left that black bag and contents in room 311. As a matter of fact, the receipt in the black bag affirmed that the appellant would have been in possession of the black bag and refuted as well that the appellant could have been innocent.

[19] We have closely examined the defence. But we see no doubt on the prima facie case. The defence, which in the main had relied on a fictional figure, had not cast any doubt on the truth of the evidence that the appellant had exclusive possession of room 311, that the appellant who was in exclusive possession of room 311 was also in possession of the black bag and contents in room 311 (see *Thien Teck Soon v Public Prosecutor* [2011] 3 MLJ 438; [2011] 3 CLJ 632, 635), and that the appellant had all requisite knowledge of the presence of drugs. There was no doubt that the appellant was knowingly, in the sense as opposed to unknowingly, in possession of the drugs in question.

[20] The drugs in question were of a weight that attracted the presumption of trafficking. In relation to the invocation of the presumption of trafficking by the learned judge at the end of the entire case, it was contended by learned counsel that miscarriage of justice had been occasioned by the invocation of different presumptions at the close of the prosecution case and at the close of the defence. At the close of the prosecution case, the learned judge had indeed invoked s 37(d). But that invocation of s 37(d) would have been reversed by the Court of Appeal on 6 July 2010, when the appeal by the prosecution against the learned judge's amendment of the trafficking charge was allowed. The finding of fact by the learned judge at the close of the prosecution case was that there was no direct evidence of a trafficking activity. Now given that finding of fact, but yet the Court of Appeal had ordered the appellant to enter upon his defence on the original trafficking charge, it could be surmised that the Court of Appeal must have disagreed with the finding that there was no direct evidence of a trafficking activity and or disagreed with the finding that possession could only be proved with the invocation of s 37(d). In any event, when trial recommenced on the original trafficking charge, the learned judge understood it to be (see 28AR) that the invocation of s 37(d) had been reversed by the Court of Appeal, that possession had been made out without the invocation of s 37(d), that there was a prima facie case, that s 37(da) was available to the prosecution, and that the outcome of the trial would depend on whether the defence 'berjaya menimbulkan keraguan yang munasabah terhadap kes pihak pendakwaan dan juga atas imbangan kebarangkalian, sama ada OKT telah

berjaya mematahkan anggapan di bawah seksyen 37(da)(xxii) ADB 1952 …' (see p 28AR). When trial recommenced, the invocation of s 37(d) at the close of the prosecution case had been reversed and was all in the past. Only s 37(da) was invoked by the learned judge at the close of the entire case. We see no miscarriage of justice in that.

[21] Contrary to the assertion of learned counsel, we also respectfully disagree that the evidence against the appellant was by inference alone. The key and the receipt were direct evidence that implicated the appellant. That the methamphetamine on the body of the appellant and the methamphetamine in the back bag were of the same colour, was also some direct evidence that implicated the appellant. *Mustakim Chek Man v Public Prosecutor* [2010] 2 MLJ 760; [2010] 6 CLJ 256, which was cited by learned counsel, had different facts, for in that case, the appellant was not the sole occupier of the flat and it was not proved that the appellant was the occupier of the room from where the subject drugs were uncovered. In the instant case, the appellant had exclusive possession of room 311 and had possession of the said prescribed drugs. With the invocation of s 37(da), the offence of trafficking had been clearly made out. Doubt had not been cast on the prima facie case. Suffice it to say, that we are satisfied, beyond all reasonable doubt, that conviction was the correct verdict.

[22] For those reasons, we unanimously dismiss this appeal and affirm the conviction and sentence.

Appeal dismissed.

Reported by Kohila Nesan